THE COURT OF APPEAL

Edwards J.
McGovern J
Baker J

Neutral Citation Number: [2019] IECA 287

Record No: 1151/2014

THE CRIMINAL ASSETS BUREAU

RESPONDENT

V

MARTIN FOLEY

APPELLANT

JUDGMENT of Mr. Justice Edwards delivered on the 20th of November 2019

Introduction

1. This is an appeal from the judgment and Order of the High Court (Birmingham J) dated the 20th of January 2014, and perfected on the 21st of January 2014 granting liberty to the respondent to enter final judgment in the sum of €738,449.27, representing the "balance" of the amount claimed by the respondent by a Notice of Motion dated the 26th of September 2013 in proceedings brought by way of a Summary Summons issued on the 8th of March 2013; and awarding the costs of the said motion and Order to the respondent.

2. The appellant seeks the setting aside of the Order of the High Court, and such further orders as this Court may see fit to grant, including an order remitting the matter for plenary hearing on the basis that the appellant has an arguable defence to the respondent's claim insofar as it extends to the said "balance".

The Background to the Matter

3. The background to the matter is not in dispute. The appellant was believed to have been engaged in criminal activity and to have enjoyed substantial gains arising from this activity and from other unknown sources. The appellant was assessed to tax in respect of income enjoyed by him during the tax years 1993-94 to 1999-2000, inclusive, which gave rise to a liability for income tax of IR£172,586.80.

4. The appellant sought to appeal against the assessments that had been raised. However, to have a valid appeal he was required under s.957 of the Taxes Consolidation Act, 1997 ("the TCA") to have made returns of any income which he had enjoyed and to pay the amounts of tax due on the face of those returns. He duly submitted tax returns in order to avail of the appeal process, and these returns showed an aggregate income of IR£56,841.00 for the years in question in respect of which there was a liability to income tax in the amount of IR£15,050.97.

5. The appellant did not pay the amount of tax due on foot of the returns that he had made. At this point he made a part payment only in respect of his admitted liability, in the sum of IR£3,000.00. As full discharge of any admitted liability due based on returns made is a statutory precondition to the validity of an appeal against a taxpayer's liability for an alternative figure based on an assessment or assessments raised, the revenue officer concerned refused the appellant's appeal.

6. The appellant then sought to appeal the revenue officer's decision to the Revenue Appeals Commissioner. He submitted revised returns suggesting he had been in receipt of an aggregate income of IR£105,519 during the tax years in question, giving rise to a revised income tax liability of IR£39,814.32.

7. It is relevant to what follows to note that the changeover to euros for the general populace occurred on the 1st of January 2002.

8. The appellant made three further part payments towards his aggregate income tax liabilities over January and February 2002. These were in punts, amounting in total to IR£22,966, and required to be converted to euro. However, even when converted the total of them fell short of what was required to be paid. Once again, as the statutory precondition to the pursuit of a valid appeal, namely the payment in full of any admitted tax liability on foot of returns made, had not been satisfied the application to the Revenue Appeal Commissioner to set aside the refusal of the initial appeal by the revenue officer was itself refused. The evidence suggests that this also occurred in February 2002. The appellant did not attempt to further appeal to the Circuit Court, a possibility that was open to him at the time. Moreover, he neither sought to have a case stated for the opinion of the High Court, nor to challenge the decision of the Revenue Appeals Commissioner in judicial review proceedings before the High Court.

9. In the circumstances the assessments became final and conclusive in the amounts stated therein, i.e., in aggregate IR£172,586.80 (equivalent to €218,140.07), and the appellant was liable to pay that amount less the four sums which had been paid on account up to that point.

10. The appellant subsequently made a fifth payment on account of €8,442.67 on the 29th of March 2002. Total part payments, after punt to euro conversions, when deducted from the euro equivalent of the assessed aggregate figure (i.e., €218,140.07) left a balance due for collection on foot of the said assessments, and before any question of interest, of €178,510.85.

11. The tax paid on account was subsequently allocated by the Collector General against the liabilities for 1993/94 and 1994/95 respectively, but the remaining balance of €178,510.85 fell to be collected for the income tax years 1995/96 to 1999/00, inclusive. It was not paid, however, and eventually, in 2013, the respondent brought proceedings against the appellant by Summary Summons claiming a total of €881,257.87, being the said sum of €178,510.85 claimed as income tax due and owing, and an additional sum of €633,956.09 for interest due on the unpaid tax up to the 31st of January 2013 pursuant

to the TCA 1997. The respondent subsequently issued a Notice of Motion dated the 26th of September claiming liberty to enter final judgment in respect of both amounts, and a further sum for continuing interest.

12. The appellant's liability to income tax and interest due in respect of each of the income tax years 1995/96 to 1999/00 is apportioned in the manner set out in the Special Indorsement of Claim to the Summary Summons herein, which was issued on the 8th of March 2013. No issue was raised as to the accuracy of calculation of the figures being claimed, either in the High Court, or before us, although liability for the interest element remains very much disputed. Further, it is uncontroversial insofar as the appeal is concerned that the respondent has obtained liberty to enter final judgment for the principal amount of €178,510.85 by Order of the High Court (Birmingham J) dated the 20th of December 2013, and the appellant raises no issue in respect of it and admits and accepts that it is due.

13. As stated, the controversy on this appeal arises with respect to the additional sum of €633,956.09 claimed for interest, which together with additional interest which had accrued to the date of judgment, resulted in the respondent being granted liberty to enter final judgment on the 20th of January 2014 for a further sum of €738,449.27, which is the sum referred to in the introduction to this judgment as the "balance" of the amount claimed by the respondent in its Notice of Motion dated the 26th of September 2013.

14. An important contextual detail is that the claim for liberty to enter final judgment in respect of this "balance" was resisted in the court below on the basis that the respondent had been guilty of an inordinate and inexcusable delay for which no justification had been offered and the appellant was claiming that he was "unduly prejudiced" on account thereof. It was argued on his behalf that the claim for interest should be remitted for plenary hearing on the basis that such was the extent of the delay, and the prejudice arising therefrom, that he appellant could mount an arguable defence to the effect that the respondent must be deemed to have waived its entitlement to pursue the appellant for interest. While neither the appellant's initial grounding affidavit sworn on the 29th of July 2013, nor a supplemental affidavit sworn by him on the 1st of November 2013, nor a further replying affidavit sworn by him on the 19th of December 2013, adequately particularised the prejudice being claimed, the trial judge adjourned the matter from the 20th of December 2013 until the 20th of January 2014, to afford the appellant the opportunity to file yet another affidavit in order to provide further and better particulars of the prejudice that he had suffered if he could do so.

15. The appellant subsequently filed yet another "further replying affidavit" sworn by him on 13th of January 2014. In this latest affidavit he averred, *inter alia*, that:.

> "With regard to the issue of delay, I wish to reiterate that I have been taken by surprise by these proceedings. To date, the plaintiff has failed to provide this Honourable Court with any explanation as to why the proceedings have been commenced over 11 years after the matters were listed before the Appeals Commissioners. I say and believe that acute prejudice will arise in circumstances

where the plaintiff claims to be entitled to recover vast sums of money in respect of interest which it alleges has accrued over a period of literally hundreds of months. As I have done so from the outset, I question the propriety of such proceedings and I dispute the plaintiff's entitlement to recover any such sums in circumstances where the plaintiff has been guilty of what I believe to be inordinate and inexcusable delay in the prosecution of these proceedings"

16. Later, at paragraph six of the same affidavit, the appellant added:

> "As I have endeavoured to explain in my previous affidavits I was of the belief, up to the time of the commencement of these proceedings, that the Revenue Commissioners and the plaintiff had resolved not to pursue these proceedings and that this was a form of tacit acknowledgment of the legitimacy of your deponents claim in a separate set of proceedings entitled *Martin Foley v Charles Bowden* wherein I sought damages as against Mr. Bowden. Had I been aware of the plaintiff's intention to pursue this current course of action I say that I would have sought to take the necessary steps, at the time when the original assessments were raised, to address the various issues and to address any liabilities outstanding at that time. I believe that I am now facing an almost impossible situation at a remove of some 11 years."

17. At the resumed hearing on 20 January 2014 the High Court judge ruled as follows:

> *"Right. Well, when the matter was before me last, at that stage the plaintiff was seeking liberty to enter final judgment for a sum that covered both the actual tax involved and also interest. The various authorities in relation to summary judgment were opened to me, Ryanair and Aer Rianta and the others, including the summary of the principles applicable by Mr. Justice McKechnie in -- I think it's Harrisgrange is the name of the case and I indicated that I was very conscious that it was only in a situation where it was very clear that the defendant had no defence that it would be appropriate to permit judgment to be entered on the summary basis and I, in effect, separated the Courts Acts and the interest element. So far as the interest element was concerned, insofar as there had been suggestions of prejudice and so on, I indicated that I would provide an opportunity to Mr. Foley to put before me material that would establish that matters were not very clear and, if he was in a position to do that, then liberty would be given to defend the interest aspect. It seems to me that the latest affidavit really just doesn't push the matter any further at all. There is no indication of actual prejudice. It seems to me therefore that, on the basis of the established jurisprudence, whatever delay that there has been, that is necessary to look at the situation in the round and this is a situation where substantial debts are due. No indication has been put forward of any actual defence and it seems to me that, in the circumstances, that the plaintiff is entitled to liberty to enter judgment in respect of the balance of the claim."*

The grounds of appeal

18. The Notice of Appeal complains:

(i). that the High Court judge erred on the facts and in law in determining that the respondent was entitled to enter final judgment as against the appellant;

(ii). that the High Court judge erred on the facts and in law in granting the respondent liberty to enter final judgment as against the appellant;

(iii). that the High Court judge erred on the facts and in law in determining that the appellant had no defence to the proceedings;

(iv). that the High Court judge failed to attribute sufficient weight to the respondent's delay in prosecuting the within proceedings.

The appellant's case

19. Notwithstanding references in the appellant's affidavits to separate proceedings entitled *Martin Foley v Charles Bowden*; and the contention that the respondent had tacitly acknowledged the legitimacy of those proceedings, in consequence of which the appellant was contending that he had been induced to believe that the respondent had resolved not to pursue the present proceedings, it was confirmed at the appeal hearing that the appellant was not making any claim based on legitimate expectation. Moreover, he was no longer pressing the suggestion that the matters alluded to could provide him with any defence to the respondent's claim for interest on the revenue debt due.

20. In the circumstances, the appellant's case as argued on appeal rested solely on a claim of prejudice arising from alleged inordinate and inexcusable delay on the part of the respondent in pursuing recovery of outstanding taxes from the appellant. Moreover, it was expressly confirmed by counsel for the appellant that his client was not making a case of specific prejudice in terms of the ability to defend the claim for interest. To the extent that he claims to be prejudiced the prejudice is general prejudice, principally manifested by the size of the interest bill which has by this stage accrued. In that regard his contention is simply that if the respondent had moved more quickly the interest bill would have been smaller.

21. The proposition being contended for as framed by counsel for the appellant is that, although there is no statutory limitation period within which these proceedings might have been commenced the court has an overarching supervisory function to ensure, *inter alia*, that cases are prosecuted with reasonable expedition. Moreover, he submits, in every case a point is reached where delay is such that there would have to be a consequence, either in terms of preventing the delaying party from maintaining his or her claim at all or reducing the premise on which the claim could be advanced. Counsel contends that that point has been well exceeded in the present case in circumstances where there was a delay of in the order of 11 years in commencing these proceedings.

22. The appellant relies on the cases of *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 and *Cassidy v. The Provincialate* [2015] IECA 74 to support his contention that while this court must give due consideration to the conclusions of the High Court judge, we retain a residual jurisdiction to exercise our own discretion should the

interests of justice dictate such an approach. The respondent has not sought to contest this as a proposition of law.

23. We were also referred to the well-established jurisprudence setting out the principles that govern the exercise of the court's jurisdiction on an application for summary judgment. In particular we were referred to *Ulster Bank limited v. Walter de Krester and Gillian Fox* [2015] IEHC 359; *IBRC v. McCaughey* [2014] 1 IR 749; *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 IR 607; *Danske Bank a/s (t/a National Irish Bank) v. Durkan New Homes* [2010] IESC 22; *McGrath v. O'Driscoll* [2007] ILRM 203, establishing that the test is: *is it "very clear" that the defendant has no case?*, *per* Hardiman J in *Aer Rianta c.p.t. v. Ryanair Limited*. Moreover, in regard to the "credibility" of a putative defence:

> "a defence is not credible simply because the judge is not inclined to believe the defendant. … If issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction identified in McGrath v. O'Driscoll [2007] ILRM 203, the court may come to a final resolution of such issues. That the court is not obliged to resolve such issues is also clear from Danske Bank a/s (t/a National Irish Bank) v. Durkan New Homes [2010] IESC 22."
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> -Per Clarke J in *IBRC v. McCaughey* [2014] 1 IR 749.

24. It was also emphasised in *IBRC v. McCaughey* that in relation to facts put forward by the defendant in the context of seeking to defend a claim for summary judgment that, subject to one qualification, the court is required to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The qualification referred to is the distinction between *mere assertions* and facts that are either supported by evidence or are supported by a realistic suggestion that evidence may be available. The court is not obliged to accept mere assertions.

25. The respondent has taken no issue with the summary of the law presented by the appellant relating to the general principles that govern the exercise of the court's jurisdiction in the context of applications for summary judgment.

26. In relation to the specific issue of delay, we were referred by the appellant to this court's decision in *McNamee v. Boyce* [2016] IECA 19, were Irvine J considered the effect of delay in detail and a cited with approval the dictum of Diplock LJ in *Allen v. Sir Alfred McAlpine & Sons Limited* [1968]2Q.B. 229 to the effect that:

> *"The chances of the court be able to find what really happened are progressively reduced as time goes on. This puts justice to the hazard."*

27. In *McNamee v. Boyce*, Irvine J considered two "*slightly differing*" lines of authority in the context of inordinate and inexcusable delay, namely (a) the test set out by Finlay P in *Rainsford v. Limerick Corporation* [1995] ILRM 561 which was expanded upon and ultimately became the test in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 IR 459; and (b) that based on *O'Domhnaill v. Merrick* [1984] IR 151.

28. Earlier, in *Cassidy v. The Provincialate* Irvine J had set out the difference between the *Primor* and *O'Domhnaill* tests and in doing so stated why she considered it appropriate that the burden on a defendant who seeks to have the claim against them dismissed where a delay on the part of the plaintiff is excusable should rightly have to establish nothing short of a real risk of an unfair trial or unjust result. At para. 37 of her judgment in *Cassidy* she stated:-

> *"Clearly a defendant, such as the defendant in the present case, can seek to invoke both the Primor and the O'Domhnaill jurisprudence. If they fail the Primor test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the Primor Test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. That this appears to be so seems only just and fair. Why should a plaintiff found guilty of inordinate and inexcusable delay be allowed to say that just because it is possible that the defendant may get a fair trial that the action should be allowed to proceed when the evidence establishes that they would have been in a much better position to defend the proceeding if the action had been brought within a reasonable time? Likewise, why should a plaintiff who has not been guilty of any culpable delay have their claim dismissed where the court is satisfied that the defendant is not at any significant risk of an unfair trial or unjust result but where, by reason of the passage of time it has become moderately more difficult to defend a claim?"*

29. In this case the appellant, in circumstances where he concedes that he cannot establish prejudice likely to lead to a risk of an unfair trial, relies firmly on the *Primor Plc v. Stokes Kennedy Crowley* line of jurisprudence.

30. It seems to me that in terms of his desire to defend the respondent's claim against him based on delay, two questions arise: (i) has he an arguable case that the respondent, or the Collector General of the Revenue Commissioners in whose shoes the respondent stands, was guilty not just of delay but inordinate and inexcusable delay, and (ii) if so, that the balance of justice would tilt against allowing the respondent to recover some, or perhaps all, of the interest claimed on the tax debt in respect of which the respondent has already secured judgment? Clearly, the question of the balance of justice would only arises for consideration if the delay in question was found to be inordinate and inexcusable.

31. Counsel for the appellant contends that he does have an arguable case that the approximately 11-year delay in this case, which is entirely in the nature of pre-commencement delay, and which is unexplained, was inordinate and inexcusable. In support of this contention, we were referred to several tax cases in which the issue of delay has previously been considered. These were *Deighan v Hearne* [1990] 1 IR 499 and *Fortune v The Revenue Commissioners* [2009] IEHC 28. His case in that regard is that although the Supreme Court in *Deighan v Hearne* found that the assessment of tax was an administrative function and not a judicial one, O'Neill J in *Fortune v. The Revenue Commissioners* held that:

> *"This finding does not go so far as to mean that the general principles which emanate from protracted civil litigation cases would not be applicable to a case involving the exercise of an administrative function."*

32. Counsel for the appellant conceded that he can provide no authority as to where the line is to be drawn in a case such as the present between mere delay and inordinate and inexcusable delay. Be that as it may, he says that, notwithstanding that he cannot pinpoint precisely where the boundary was crossed, it can nonetheless be cogently argued that it has been crossed in this case. Consequently, he maintains, it cannot be said that it is "very clear" that his client has no case.

The respondent's case.

33. The respondent has submitted that the observations in the appellant's submissions regarding *Fortune v. The Revenue Commissioners* are noted. However, that case was concerned with whether the Revenue could *"… in equity now be restrained from proceeding with the … assessment …"* In the instant case, there was no issue raised about the time taken to issue the assessments. The assessments against the appellant were issued in a timely fashion and became final and conclusive after the unsuccessful attempted exercise of the appeal mechanisms available to the appellant.

34. Assuming the *Primor* line of authority to be applicable to the respondent's proceedings for liberty to enter final judgment, the respondent says that it is notable that the appellant did not bring an application to strike out the proceedings against him. Nor did he place before the Master of the High Court or the High Court itself such averments as would have satisfied the test in the *Primor* line of authority. In circumstances where the appellant was statutorily obliged to pay his taxes, was fully aware of the level at which they had been assessed against him and was also fully aware that should he fail to pay the tax assessed he would be liable for interest thereon pursuant to statute until judgment or payment, he cannot credibly contend that the respondent's pre-commencement delay was inordinate and inexcusable. He had always it within his power to stop the interest clock from running. All he had to do was to pay the tax that he owes, and which he accepts that he owes. Moreover, the appellant did not place before the Master, or the High Court, material which showed prejudice or other evidence which would incline a judge to conclude that the balance of justice favoured striking out the proceedings.

Decision.

35. There is no statute of limitations that would have limited the period within which the respondent, or the Collector General, could have commenced action against this appellant to recover both the taxes assessed against him, and any interest accruing because of late payment of those taxes. It is a matter of public policy that people should pay their taxes in a timely manner. A citizen's obligations in that regard are statutory, and those obligations are common knowledge. The appellant had no basis for any confidence that he would not ultimately be pursued in respect of his debt and interest, nor could he have had in the light of his statutory obligations and the public policy considerations alluded to.

36. In addition, while the appellant contends that if action had been commenced sooner, his interest bill would have been smaller, the point made by the respondent concerning his own default is well made. He well knew that he had an unpaid bill for taxes due, he well knew that interest was accruing, he had no basis for believing that those taxes would not ultimately be pursued, and so it was totally within his power at every stage to stop the interest clock from running and to cap the interest bill. All he had to do was to pay the outstanding taxes that he admits were due.

37. While it is true that the respondent has put forward no explanation for the pre-commencement delay in this case, the mere existence of a substantial and unexplained delay does not make that delay presumptively inordinate and inexcusable. It is necessary in every case to have regard to the actual delay and its implications for the late claim then being brought.

38. Inordinate simply means out of the ordinary, and I would have to accept that an eleven-year pre-commencement delay is arguably inordinate.

39. However, was it also arguably excusable? In that regard, Hamilton C.J., in *Primor* made clear that the onus of establishing that delay has been both inordinate and inexcusable would appear to lie upon the party seeking a dismiss and opposing a continuance of the proceedings (or as applied to this case, the party seeking to resist summary judgment).

40. I am not satisfied that the appellant has discharged that onus, particularly in circumstances where there manifestly has been, having regard to the identity of the respondent, a relevant Criminal Assets Bureau investigation. Having regard to the appellant's statutory obligations with respect to the prompt payment of taxes due by him, the level of his knowledge, and the absence of any claim of specific prejudice other than the size of the interest bill itself, I do not believe that it can be credibly argued that such pre-commencement delay as occurred in this case was inexcusable, or that the balance of justice would require preventing the respondent from maintaining its claim for interest incurred pursuant to statute, either in whole or in part.

41. I am not therefore persuaded that were this case to go to plenary hearing with respect to the interest being claimed by the respondent that the appellant could present an arguable case based on the *Primor* line of authority that he should not have to pay that interest. It is clear to me that the appellant has no case, and I would dismiss the appeal.